No. 12,662

IN THE

United States Court of Appeals

For the Ninth Circuit

JOSEPH DENUNZIO FRUIT COMPANY (a corporation),
Appellant and Cross-Appellee,

vs.

RAYMOND M. CRANE, doing business as Associated Fruit Distributors,
Appellee and Cross-Appellant,

JOHN C. KAZANJIAN, doing business as Red Lion Packing Company (a corporation),
Appellee.

BRIEF OF APPELLEE JOHN C. KAZANJIAN.

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BRIEF OF APPELLEE JOHN C. KAZANJIAN.

JURISDICTIONAL STATEMENT.

This action originated before the Secretary of Agriculture under the provisions of the Perishable Commodities Act of 1930 (7 U.S.C.A. 499).

John C. Kazanjian, doing business as Red Lion Packing Company, hereinafter referred to as "Kazanjian", and Raymond M. Crane, doing business as

Associated Fruit Distributors, hereinafter referred to as "Crane", each filed answers to the amended complaint of Joseph Denunzio Fruit Company, hereinafter referred to as "Denunzio". Thereafter, a formal hearing was had in Los Angeles, California, before an examiner appointed by the Secretary of Agriculture. At the close of the hearing the examiner granted a dismissal of the proceeding insofar as it affected Kazanjian (Tr. pp. 70-71). The Secretary of Agriculture then rendered a Reparation Order against Crane and dismissed the proceeding as to Kazanjian (Tr. p. 79).

Crane appealed to the United States District Court for the Southern District of California, Central Division, and on trial *de novo* before Judge J. F. T. O'Connor, the order of the Secretary of Agriculture, against Crane and dismissing as to Kazanjian, was affirmed by an opinion reported in 79 F. Supp. 117. Denunzio elected in writing to hold Crane liable and not Kazanjian (Tr. p. 138).

Crane made a motion for a new trial. Judge O'Connor died before the motion was presented and it was heard by Judge James M. Carter. Judge Carter granted the motion for a new trial but by an opinion reported in 89 F. Supp. 962 ruled that a new trial was unnecessary because the contract relied upon was invalid as violating the Emergency Price Control Act. He thereupon ordered the action dismissed as to both Crane and Kazanjian.

An appeal was filed by Denunzio and a cross-appeal was filed by Crane.

The Secretary of Agriculture is given jurisdiction to determine the matter presented to him by the provisions of 7 U.S.C.A., Sec. 499 (f) and (g). The jurisdiction of the United States District Court to hear and determine the appeal from the order of the Secretary of Agriculture is based on the provisions of law contained in 7 U.S.C.A., Sec. 499 (g). The United States Court of Appeals is given jurisdiction to review the judgment of the United States District Court under the provisions of law set forth in Section 128 of the Judicial Code, 28 U.S.C.A., Sec. 1291.

SUMMARY OF ARGUMENT.

I. Denunzio elected in writing in the lower Court, to hold Crane responsible and not to proceed against Kazanjian. On appeal it cannot change the theory of its case as against Kazanjian.

II. Kazanjian at no time entered into a contract to sell grapes to Denunzio upon which either party can be bound. There was no offer or acceptance or meetings of minds upon the terms of a contract.

III. The contract claimed by Denunzio, even if there were such a contract, was illegal and void because the sales price exceeded the ceiling price for the grapes under the Emergency Price Control Act then in effect.

ARGUMENT.

I.

DENUNZIO CANNOT ON APPEAL CHANGE THE THEORY OF ITS CASE AS AGAINST KAZANJIAN.

As will be apparent from a reading of the transcript and of the briefs of both appellants, it has been practically conceded by both at all times that the action should be dismissed as to Kazanjian. At no time did Denunzio indicate any theory or serious claim that Kazanjian was in any way liable to Denunzio. His brief makes no attack upon any of the orders dismissing the action as to Kazanjian i.e. the orders dismissing the action as to Kazanjian made by the examiner for the Secretary of Agriculture, by the Secretary of Agriculture and by the District Court of the United States, Southern District of California, in the trial *de novo* (79 F. Supp. 117), and upon the motion for a new trial (89 F. Supp. 962). Denunzio, at the trial *de novo* in the District Court, filed his written election to proceed against Crane and not Kazanjian (Tr. p. 138).

Insofar as Kazanjian is concerned, Denunzio must adhere on appeal to the theory upon which the case was tried in the Court below. Having elected not to proceed against Kazanjian he cannot now complain of the dismisal in favor of Kazanjian since it has been uniformly held that the theory upon which the case was tried in the lower Court should be the theory considered on the appeal.

Parrott Estate Co. v. McLaughlin, 89 F. (2d) 188, 190;

Sacramento Suburban Fruit Lands Co. v. Melin, 36 F. (2d) 907, 909;

Gibson Properties Company v. City of Oakland, 12 Cal. (2d) 291, 299, 83 Pac. (2d) 942.

Crane, of course, is not seeking any relief against Kazanjian.

II.

KAZANJIAN AT NO TIME ENTERED INTO A CONTRACT TO SELL GRAPES TO DENUNZIO.

Kazanjian agrees with the contention of Crane that the evidence does not sustain either the Findings of Fact or Conclusions of Law that Crane acted on behalf of or as agent for Kazanjian. In the interest of brevity, no review of the evidence need be set forth in view of Crane's outline in his brief of the evidence showing that he was not acting on behalf of or as an agent for Kazanjian.

Any contract upon which Kazanjian can be held liable must arise out of two telegrams, being Crane's Exhibit "N" (Tr. pp. 217 and 218).

The first telegram from Crane to Kazanjian was an offer. It read:

"Western Union

Bq Losa Ly Ser Fruit Oct 3 1944
Red Lion Packing Co.
Exeter, Calif.

Referring telephone have sold for your account basis 2.50 lug net to you Block Emperors

mentioned five cars basis 750.00 car deposit ten cars basis 1000.00 deposit to be paid upon receipt USONE government inspections now depending you handle through us balance cars you mention for fresh shipment advise when expect ship these believe we could place them now ceiling pricdxxxprice with deposits selling basis ability make USONE grade suggest give us appropriate shipping dates mays well get cleaned up since ceiling precludes any possibility higher market time of shipment will forward confirmations for your signature soons receive airmail from buyers.

Associated Fruit Distributors
of California".

The second telegram from Kazanjian to Crane did not accept the latter's offer but made a new offer which was never accepted. Kazanjian's telegram read:

925A
S2BQ
SL58 77

Exeter Calif Oct 4 1944 11OP
Associated Fruit Distributors

Fifteen cars storage US One Emperors December tenth conversion satisfactory at two dollars and fifty cents fob Exeter guaranty by buyer. One thousand dollars deposit on 10 cars and seven hundred fifty dollars on five cars said deposit to be paid immediately on inspection at shipping point. You to arrange for storage as agreed. Balance of pack intend to load after

Oct twentieth will be glad to make deal on said about the 15th of Oct.

John C Kazanjian

150pm
US fob 10 15 Kazanjian"

Because of the elemental rule that there must be an offer and an acceptance and a meeting of minds before there can be a contract, no contract can be found from these two telegrams. The two do not meet with the degree necessary to establish a contract.

Crane's wire provided for payment "upon receipt USONE government inspections", which could only mean receipt by buyers at their office in Kentucky. Kazanjian did not accept this but made a counter offer providing for payment "immediately on inspection at shipping point" i.e. Exeter, California.

Crane's offer included the term "now depending you handle through us balance cars you mentioned for fresh shipment * * *", while Kazanjian's counter offer definitely excluded this term from the deal by stating "Balance of pack intend to load after Oct twentieth will be glad to make deal on some about the 15th of Oct."

Kazanjian's wire required Crane "to arrange for storage". This was not mentioned in Crane's message.

Crane's message states "will forward confirmations for your signature soons receive airmail from buyers."

No confirmations were ever received and forwarded to Kazanjian (Tr. p. 220).

The two wires contain terms which clash rather than mesh and no contract can be found from them. Crane himself testified that no agreement with Kazanjian was ever reached (Tr. p. 224).

Kazanjian cannot be found liable to Denunzio unless he is a party to a binding contract. There is none here.

III.

THE CONTRACT, IF THERE WAS ONE, WAS ILLEGAL AND VOID BECAUSE THE SALES PRICE EXCEEDED CEILING PRICE UNDER EMERGENCY PRICE CONTROL ACT.

Judge Carter in his decision (89 F. Supp. 962) granting a new trial ruled that the contract was illegal and void as requiring a sales price in excess of the ceiling price provided in the Emergency Price Control Act of 1942, as amended.

An analysis of Judge Carter's decision and of Denunzio's brief attacking it sustains the decision of the Court below.

The contract, if there was one, called for a price of $2.50 per lug, plus an added charge of $50.00 per car to Crane, plus any charge paid to A. B. Rains, Jr., a broker in Louisville, Kentucky.

Denunzio, on page 12 of its brief, says:

> "Judge O'Connor in his Findings found the applicable maximum ceiling price to be $2.53 per

lug (Finding of Fact II, Tr. p. 140). Judge Carter, on the other hand, in his opinion, held the applicable maximum ceiling price to be $2.50 per lug (Tr. p. 166). If the ceiling price were $2.50 per lug, then an added procurement charge of $50.00 per car would of necessity make the total price over the legal ceiling. In such case, the illegality would be apparent on the face of the contract. On the other hand, if the applicable ceiling price was $2.53 per lug, then a contract requiring a price of $2.50 per lug plus a procurement charge of $50.00 per car would not be illegal on its face. Under such circumstances, it would be up to the party contending that such a contract was illegal to raise this as an affirmative defense and to prove that on the basis of the car-loadings contemplated under the contract, $50.00 per car amounts to more than 3¢ per lug. This the respondent Crane failed to do."

Whether the ceiling price was $2.50 or $2.53 per lug is immaterial. If we assume there were 1100 lugs to the car (while Denunzio on page 17 of its brief intimates there is no basis for the Court so assuming "if the result is to declare the whole contract null and void" its brief points out the very evidence from which the Court could so find. Incidentally, without the same finding from the same evidence there is no evidence upon which any of the tribunals below could assess the amount of damages awarded Denunzio against Crane), the $50.00 per car to Crane would equal $.0454+ per lug. This amount added to the $2.50 per lug gives a price of $2.5454+ per lug, or in excess

of the $2.53 per lug ceiling claimed by Denunzio, without consideration of any payments to Mr. Rains.

In view of the clarity of Judge Carter's decision it is not believed necessary to elaborate further upon this point.

CONCLUSION.

In conclusion, we submit that the decision of the tribunal below should be affirmed. Denunzio elected to proceed against Crane and not Kazanjian in the United States District Court and should not upon appeal be permitted to change the theory of its case. Kazanjian at no time entered into any contract with Denunzio upon which Kazanjian can be bound. The very contract upon which Denunzio relies would be illegal and void because the sales price of the grapes exceeded the ceiling price therefor under the Emergency Price Control Act of 1942, as amended.

Dated, Fresno, California,
January 2, 1951.

Respectfully submitted,
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